Paid Prioritization and Zero Rating: Why Antitrust Cannot Reach the Part of Net Neutrality Everyone Is Concerned About

Hal J. Singer

As Internet-based distributors move up and down the stack to become vertically integrated platforms with a preferred suite of affiliated content, there is a growing concern among policymakers that innovation among independent content creators and websites may be threatened. More fundamentally, the Internet is not one thing—it is many things, and our current regulatory regimes are struggling to address that complexity.

These new platforms give rise to potential conflicts of interest, in which it might pay for a vertically integrated platform owner to sacrifice some profits (if any) in its distribution division in order to support an affiliated (or favored, third-party) application. For example, what happens when Amazon structures its Alexa voice platform to give one (and only one) response to a question about booking a car rental at an airport? (Amazon recently struck a deal with Avis to do exactly this.[1]) Can Amazon offer preferential treatment without distorting competition in ancillary markets? Or must it abide by some non-discrimination standard—for example, by offering to accept bids for the first response, or to rotate the first response among all similarly situated comers? Because such mild favoritism likely would not produce a short-run price or output effect, antitrust may not be suited to police such conduct.

This essay focuses on identifying and fixing this potential regulatory gap when crafting a "net neutrality" policy—a set of rules or standards designed to spur innovation at the "edge" of the Internet by preventing Internet service providers (ISPs) from engaging in discriminatory conduct.[2] But the essay could just as easily be directed at the powerful online platforms wielded by Amazon, Facebook, or Google. The applicability of this remedy to other parts of the Internet is natural, not because market power is paramount there (though it certainly exists), but because there is a large enough threat to innovation in adjacent markets to online shopping, social media, and search, respectively.

Consider a hypothetical case in which an ISP offers preferential treatment for an online content supplier's packets for a fee, but declines to make the same terms available to other content providers. To make the matter concrete, assume the preferred content supplier offers telemedicine

■ *Hal Singer is Principal, Economists Inc., and Senior Fellow, George Washington Institute of Public Policy.* *The author thanks the following reviewers: Sally Hubbard, Daniel Lyons, Tejas Narechania, Jonathan Kanter, Robert Kulick, Terrell McSweeny, Blake Reid, Kevin Werbach, and Joshua Wright. The author has served as a consultant to both ISPs and independent cable networks in regulatory matters. The views expressed here do not represent those of the author's affiliated institutions.*

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1 *Avis Announces Amazon Alexa Integration*, SEEKING ALPHA (July 17, 2017), https://seekingalpha.com/news/3278922-avis-announces-amazon-alexa-integration?uprof=52&dr=1#email_link.

2 The precise rules or standards used to implement net neutrality can take many forms and are subject to debate. For example, in 2015, the Federal Communications Commission banned all payments from websites to ISPs for priority delivery or terminating access, and banned ISPs from blocking or throttling websites to extract such a payments. *See* Protecting and Promoting the Open Internet, Federal Commc'ns Comm'n, GN Docket No. 14 -28, FCC 15-24, Report and Order on Remand, Declaratory Ruling, and Order, Protecting and Promoting the Open Internet (Mar. 12, 2015), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf [hereinafter FCC 2010 Open Internet Order].

So long as the favored site is unable to exercise market power, there will not be a short-run output or price effect; to the extent that the quality of the preferred site rises due to the ISP's special handling, quality-adjusted prices might even fall in the short term. In this case, using antitrust enforcement to remedy the alleged harm to the disfavored app provider likely would prove futile.

service, a real-time application that performs better with enhanced quality of service from the ISP. For wireless providers, preferential treatment could, for example, take the form of the ISP's not counting the content provider's packets against the customer's data cap (known as "zero rating"). To an economist, the precise nature of the preference afforded the content provider is not critical, so long as preference of some kind is provided for a fee. What matters from a competition perspective is that as a result of the pay-for-preference arrangement, the favored content provider operates at a competitive advantage vis-à-vis its content rivals with respect to quality of service. Because the offer of preference is, by assumption here, not extended to all comers, the arrangement is discriminatory, plain and simple.

But does it amount to an antitrust offense? This essay answers that question in the negative: Unlike traditional discriminatory-refusal-to-deal (DRTD) cases in antitrust, there is no effort by the ISP in my hypothetical to disadvantage a *horizontal rival*. Even if an edge provider could structure its antitrust complaint as a DRTD, private litigants who are denied the paid arrangement are unlikely to pursue antitrust cases where the only potential harm to competition is an innovation loss (in the form of less investment/innovation by edge providers in future periods). The anticompetitive effects here are assumed not to take the form of price or output effects, at least not in the short run. When an ISP favors one content provider, the primary effect is to shift views (or clicks) towards the favored website and away from the disfavored website. So long as the favored site is unable to exercise market power, there will not be a short-run output or price effect; to the extent that the quality of the preferred site rises due to the ISP's special handling, quality-adjusted prices might even fall in the short term. In this case, using antitrust enforcement to remedy the alleged harm to the disfavored app provider likely would prove futile.

Even if the edge provider could structure what may be a violation of net neutrality as an antitrust complaint, private litigants would be reluctant to do so given the low likelihood of prevailing under the antitrust laws. Finally, competition is not the only value that net neutrality aims to address: end-to-end neutrality or nondiscrimination is a principle that many believe is worth protecting on its own.

Moreover, antitrust litigation imposes significant costs on private litigants, and it does not provide timely relief; if the net neutrality concern is a loss to edge innovation, a slow-placed antitrust court is not the right venue. The Internet-based industries at issue here are strongly characterized by first-mover effects and network effects, which renders antitrust's slow-moving process especially problematic. While public enforcement of innovation-based claims is possible, it likely would take an edge provider months if not years to motivate an antitrust agency to bring a case.

Instead of an antitrust regime, this essay offers an alternative, ex post regime patterned loosely on the tribunal used to adjudicate discrimination complaints against cable video operators pursuant to Section 616 of the Cable Television Consumer Protection and Competition Act of 1992 (Cable Act). Although that tribunal operates under the Federal Communications Commission (FCC), the proposed tribunal here could be independent, as are Article I courts,[3] operating free from reversals by political appointees at federal agencies.

Like a rule-of-reason case under antitrust, the tribunal would begin with the presumption that preferential arrangements extended by ISPs to edge providers are presumptively not in violation of a (to-be-adopted) nondiscrimination standard, but would allow complainants to overturn that

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[3] Article I judges and arbitration boards (who do not work within an agency) and administrative law judges (who work within an agency) have the power to perform adjudicatory functions within the federal system but, unlike federal court judges, possess neither life tenure nor salary guarantees. *See, e.g.*, Judith Resnik, *The Mythic Meaning of Article III Courts* (Faculty Scholarship Series, Paper 919, 1985), http://digitalcommons.law.yale.edu/fss_papers/919.

presumption upon meeting certain evidentiary criteria. Importantly, the tribunal need not import the evidentiary criteria verbatim from antitrust—for example, there would be no need to establish market power, profit-sacrifice, or short-term harm to consumers in the form of price or output effects. (Section 616 does require the complainant to prove that the conduct "unreasonably restrained" its ability to compete).[4]

Because the enforcement gaps in antitrust identified in this essay also fail to restrain search-neutrality violations, there is no reason why the tribunal could not accommodate complaints against dominant Internet intermediaries, such as Google and Facebook. In this sense, a new tribunal could provide a "layer-neutral" approach—that is, neutral at both the edges and the core of the Internet—to dealing with neutrality issues.

Are the Antitrust Laws a Good Fit?

Monopolists are generally free from legal constraints to choose their suppliers and engage in price discrimination under the antitrust laws. Where such constraints exist, the source is often industry-specific regulation. For example, the obligation to deal with rivals or content suppliers on nondiscriminatory terms flows from common-carriage or program-carriage rules under Section 202 of the Communications Act and Section 616 of the Cable Act, respectively. As explained by Christopher Yoo,[5] telecom regulators historically ensured nondiscrimination by requiring the telephone company to offer service under the terms specified by a tariff to any requesting party that qualifies to receive the service. The FCC has also imposed nondiscrimination provisions in approving cable mergers, particularly for vertical mergers involving the acquisition of cable networks. Antitrust agencies have similarly imposed nondiscrimination obligations as part of consent degrees in vertical mergers involving cable operators (such as Comcast-NBCU and Time Warner-Turner). Setting aside these merger-related exceptions, nondiscrimination obligations generally do not flow from the antitrust laws.

Indeed, the recent tendency in antitrust jurisprudence has been to relax nondiscrimination obligations. In *Terminal Railroad*, the defendant discriminated against rival railroads by refusing to grant access to its terminal facilities.[6] The essential facilities doctrine, which grew out of that case, has been undermined by more recent developments. In *Trinko*, the Supreme Court ruled that telephone companies had no antitrust obligation to deal with resellers (horizontal rivals) above and beyond the unbundling obligations in the Telecommunications Act.[7] *Trinko* cast doubt in the viability of the essential facilities doctrine, particularly as applied to regulated industries, such as telecom and potentially Internet access.

The closest surviving cognizable antitrust offense for my hypothetical case of discrimination by an ISP is a DRTD. For example, a dominant firm may discriminate by refusing to deal with—or offering worse terms to—horizontal rivals or those buyers (or suppliers) who deal with horizontal rivals. In *Aspen*, the defendants discriminated against rivals by refusing to sell lift tickets to its rival

[4] For a similar, case-by-case approach grounded in Section 706 of the Telecommunications Act (as opposed to Section 616 of the Cable Act), see Tejas N. Narechania, *Federal and State Authority for Broadband Regulation*, 18 Stan. Tech. L. Rev. 456 (2015). Narechania explains that "applying strict antitrust standards [under Section 616 of the Cable Act] might have the effect of rendering the statute superfluous to the antitrust laws themselves," and that "requiring antitrust scrutiny here also takes an overly restrictive view of the FCC's authority under the [Cable Act]." *Id.* at 475 n.111 (citing H.R. Rep. No. 102-628, at 111 (1992)).

[5] Christopher Yoo, *Is There a Role for Common Carriage in an Internet-Based World?*, 51 Houston L. Rev. 545 (2013).

[6] United States v. Terminal R.R. Ass'n, 224 U.S. 383, 391–94 (1912).

[7] Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

at any price.[8] In *Otter Tail*, the defendant discriminated against rivals by refusing to supply electric power to those municipalities that competed with the defendant in retail distribution.[9] In *Dentsply*, the defendant discriminated against rivals (indirectly) by using exclusive contracts with dental-product dealers to limit rival manufacturers' access to dental laboratories that purchase artificial teeth.[10] And in *Lorain Journal*, the defendant discriminated against rivals (indirectly) by refusing to sell advertising space to those advertisers who dealt with its rival.[11]

Based on a review of these and other seminal DRTD cases, Einer Elhauge explains that a duty to deal turns not on a prior course of dealings with the buyer or distributor, but instead on whether the dominant firm's present dealings discriminate between rivals and non-rivals,[12] in particular, whether the dominant firm deals only with non-rivals and excludes rivals. And even then, to prevail under the antitrust laws, the plaintiff would still need to demonstrate that the DRTD enhanced or maintained defendant's monopoly power and harmed competition. Robert Kulick develops an alternative post-Chicago model of exclusive dealing where exclusive dealing takes the form of a DRTD.[13]

It is important to distinguish between conditional refusals to deal and unconditional refusals to deal. For example, Carl Shapiro explains that a vertical conditional refusal to deal could involve a higher price charged to some downstream firms (such as direct competitors) than others, whereas with an unconditional refusal to deal, a dominant firm only uses its owned input internally.[14] Like other conditional refusals to deal, a DRTD could be problematic if it results in exclusion of a rival and reflects other anticompetitive indicia such as profit sacrifice or degrading quality of one's own product. But as a practical matter, the agencies largely have decided not to bring such cases. By failing to do so, they have created a perception that antitrust is not capable (or the agencies are not willing) to address such problems. Where the Federal Trade Commission has prosecuted DRTDs, the goal of the challenged conduct was to disadvantage a horizontal rival. For example, in *Transitions Optical, Inc.*, the defendant discriminated against horizontal rivals by refusing to supply lens distributors that also distributed a rival lens.[15]

The fact pattern in my paid-priority hypothetical is significantly different from a DRTD in several ways. First, the ISP is not refusing to deal with telemedicine providers who deal with other ISPs. Rather, it picked its preferred vendor and agreed to an exclusive priority arrangement in return for a payment. There is no effort to disadvantage a horizontal rival, which was the salient feature in each of the DRTD cases reviewed above. (While the content provider could buy an exclusionary right to disadvantage content rivals, the preferred vendor is assumed to lack monopoly power in any relevant antitrust market.)

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8 Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

9 Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

10 United States v. Dentsply Int'l, Inc., 399 F.3d 181 (3d Cir. 2005).

11 Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

12 Einer Elhauge, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. 253 (2003).

13 Robert Kulick, Beyond Naked Exclusion: Exclusive Dealing After *Dentsply*, (University of Maryland Dissertation 2013) (on file with author).

14 Carl Shapiro, Exclusionary Conduct, Testimony Before the Antitrust Modernization Commission (Sept. 29, 2005) http://faculty.haas.berkeley.edu/shapiro/amcexclusion.pdf.

15 Decision and Order, Transitions Optical, Inc., FTC File No. 091-0062 (Mar. 3, 2010), https://www.ftc.gov/enforcement/cases-proceedings/091-0062/transitions-optical-inc.

Second, unlike a DRTD, there is no exclusion of other telemedicine providers, as they still have access to the ISP's customers, albeit with less favorable treatment than the preferred supplier. This form of mild discrimination—in which the private harm to excluded content rivals takes the form of a relative but not absolute degradation in service quality—would seem to evade antitrust scrutiny. It is hard to imagine how this sort of preference could lead to higher costs for a rival ISP, the primary concern in a DRTD case. (Because there are no inputs that are close substitutes for quality of service—for example, increased marketing cannot compensate for lack of a higher quality of service—the costs of the disfavored website similarly would not rise as a result of the discrimination.)

Third, unlike *Otter Tail* and many other fact patterns giving rise to the "discriminatory impulse" (or tendency to favor one's own input affiliate), the ISP in my hypothetical is not vertically integrated into content, and thus lacks the typical incentive to discriminate in favor of its own affiliate.

It bears noting that several major ISPs have recently integrated into content, including Comcast (NBCU) and Verizon (Yahoo! and AOL).[16] Had my hypothetical ISP been vertically integrated into content, however, extending mild preference within the firm would likely be afforded some leeway under the antitrust laws relative to exclusionary arrangements with a third party.

Still other factors could weaken antitrust theories here. For example, if the vertically integrated ISP favored its own content, but says it will offer the same terms to other content providers that it is offering itself, then it would be hard to monitor and enforce nondiscriminatory treatment—the price for the preference would be a transfer price, which if raised by the ISP, would not affect the ISP's profits across its upstream and downstream divisions but would raise the costs of content rivals. Alternatively, the rival content provider may be offered terms for preferential treatment that make it impractical or impossible to compete effectively against the affiliated content.

Even if a rival telemedicine provider could style its complaint as a DRTD, the standard balancing of efficiencies and anticompetitive effects in a rule-of-reason case would require the complainant to show harm to competition. Notably absent from such a complaint would be any evidence of price or output effects. By offering preference to a single telemedicine supplier, while carrying the packets of rival suppliers, the ISP at most has diverted eyeballs from rival telemedicine sites to the preferred site, ensuring no output effect (assuming no obvious degradation in quality in the rivals' services). And the ISP would hardly be able to raise prices for Internet access to its customers as a result of giving preference to one telemedicine provider. Indeed, by the seesaw principle of two-sided markets, the new ISP revenue from the content side could put downward pressure on the ISP's prices to end users. While it is possible that the preferred telemedicine provider might seek to raise its prices, its quality-adjusted price would be competitive: the hypothetical here allows for the possibility of competitive discipline from other telemedicine providers receiving preference from other ISPs. With no price or output effect, the complainant would be hard-pressed to demonstrate anticompetitive effects. And even if it could, there are what could be considerable efficiencies to consider before concluding that the paid priority is anticompetitive on balance.

In my hypothetical, the harm to competition takes the form of a potential loss in innovation. In particular, rival telemedicine providers might be less inclined to invest in R&D and develop superior real-time applications if they believed the playing field was somehow slanted toward the preferred vendor.

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[16] As of the time of this writing, AT&T's intent is to integrate into content by seeking to acquire Time Warner.

It is beyond the scope of this essay to prove that the ISP would not internalize the potential harm to innovation.[17] But how would a complainant demonstrate that harm in an antitrust court? The best a complainant could offer would be evidence of exit by rival telemedicine firms, but even that would not prove a loss in innovation, as the exiting firm's connection to future innovation is tenuous. While the antitrust laws certainly recognize harm to innovation as an anticompetitive injury, a private litigant likely would not bring a case based solely on such a difficult-to-prove antitrust harm. Cases in which harm to innovation is the primary antitrust injury are brought by the agencies rarely (if at all), as was the case in *United States v. Microsoft*.[18] There the harm was not a threatened increase in the price of browsers but instead a threatened loss of middleware providers evolving—that is, an innovation loss—into rival operating systems in future periods. And even this finding was controversial according to some of the antitrust literature on the *Microsoft* decision.[19]

[T]he antitrust laws have evolved in a manner that makes it difficult to address discriminatory behavior that may adversely affect innovation. Increasingly, the agencies and courts defer to the business judgments of platform providers.

Even antitrust agencies shy away from bringing harm-to-innovation cases. Although the D.C. Circuit determined that Microsoft had liability without the Department of Justice having to demonstrate that the nascent threats would have developed into full-fledged competitors, the antitrust laws have evolved in a manner that makes it difficult to address discriminatory behavior that may adversely affect innovation. Increasingly, the agencies and courts defer to the business judgments of platform providers. While the *Microsoft* court suggests a balancing of harm and benefits, the agencies tend to stand down upon the showing of any plausible justification. It is one reason why one observes few, if any, Section 2 cases brought by the antitrust agencies. Correctly or incorrectly, agencies perceive the hurdles as too high and are loath to second-guess the decisions businesses make regarding their own platforms or infrastructure.[20] Instead, regulators focus resources on restrictions that limit or exclude firms from working with horizontal rivals. Even if the agencies were inclined to prosecute DRTDs, for the reasons outlined above, they would be hard-pressed to style a net-neutrality violation as a DRTD.

Finally, the difficulties summarized above concern fitting my hypothetical fact pattern into a cognizable offense under the antitrust laws. An added difficulty, and one that arguably is more important than the lack of fit, is the practical impediment to prevailing in an antitrust court. Antitrust moves slowly. Motions to dismiss, *Daubert* motions, motions for summary judgment, and appeals can extend the timeline of many cases beyond five years. Because of this extended timeline, there may not be adequate remedies under antitrust law to cure the innovation loss. And the litigation expense is considerable. Recall that the purpose of net neutrality protections is to preserve innovation at the edges of the network. Offering foreclosed content providers—at least some of which will be startups—a venue that could take multiple years and millions of dollars in litigation expense is tantamount to offering no relief at all.

Dissenting Views

By contrast, some notable voices in competition policy argue that antitrust can accommodate net neutrality concerns. With respect to antitrust treatment of "preferred delivery," Acting Federal

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[17] For a similar model, see Nicholas Economides & Joacim Tåg, *Network Neutrality on the Internet: A Two-Sided Market Analysis*, 24 Information Economics and Policy 91 (2012).

[18] Microsoft Corp. v. United States, 253 F.3d 34 (D.C. Cir. 2001).

[19] *See, e.g.*, Richard J. Gilbert & Michael L. Katz, *An Economist's Guide to* U.S. v. Microsoft, 15 J. Econ. Persp., Spring 2001, at 25.

[20] The reluctance to pursue innovation-based cases could also be due to the fact that economics does not provide any straightforward guide to assessing innovation harms. While economists can model exclusive dealing that has no other purpose but to raise price, there is no stark separation between conduct that will increase innovation and conduct that will not.

Trade Commission Chairman Maureen Ohlhausen acknowledges that "[f]irms pay for preferred shelf placement in supermarkets, prominent locations in shopping malls, and expensive advertising opportunities," but that "[s]uch agreements rarely create antitrust issues."[21] The reason they do not, of course, is that mild preferencing of the kind contemplated in my hypothetical often finds efficiency justifications, and, in any event, it does not pose a threat to competition recognized by antitrust. (Under certain conditions, economists can often justify on efficiency grounds not-so-mild preferencing such as exclusive deals.) Nevertheless, Ohlhausen insists that "antitrust would forbid efforts by ISPs with significant market power to foreclose rival content."[22] The kind of example she has in mind, however, is a preferential arrangement designed "to raise competing content providers' costs or, absent an alternative ISP, to exclude rival edge providers from local markets altogether."[23]

While raising-rival-cost strategies are indeed cognizable under the antitrust laws, it is not clear how an exclusive arrangement for priority delivery (in which the preferred vendor pays the ISP) raises rival telemedicine providers' costs; it is not as if the rival can attain the same special handling via some alternative higher payment. The rival pays the ISP nothing for standard treatment. The private harm to excluded content rivals takes the form of a *relative* degradation in its quality of service, which is not comparable to a cost increase; if anything, the excluded rival might be forced to drop its price. And complete exclusion from the market is also inapplicable. In my hypothetical, there is no exclusion "from local markets altogether."[24] Receiving lower priority may harm rival telemedicine providers. But there is nothing wrong with this from an antitrust perspective so long as consumers are not harmed, as is the case under the hypothetical used here.

To create a cognizable antitrust offense, Ohlhausen later uses a hypothetical of a "vertical boycott" in which "the ISP blocks or materially degrades competing content offered by other edge providers."[25] But again these are extraneous features of my hypothetical paid-priority contract with a telemedicine provider and an ISP; there is no blocking or material degradation of other providers in absolute terms under mild preferencing. She acknowledges that there may be no antitrust violation if the "edge provider partners with an ISP that agrees to prioritize its content over lesser alternatives."[26] This is precisely the garden-variety arrangement that concerns net neutrality advocates. While such mild preferencing may not raise a content rival's costs, it might discourage content rivals from investing in the development of real-time applications that could exploit special handling by ISPs. Why bother with the innovation, an edge rival might ask, if the opportunity to serve the ISP's customers with special handling is foreclosed? An exclusive arrangement could bestow a position of dominance to the preferred vendor's application. In the absence of net neutrality rules, rival content providers would not have any effective recourse to challenge the discriminatory treatment.

The larger deficiency in the defense of antitrust is the lack of specificity in how a rival content provider, denied access to the ISP's preferential treatment, would style an antitrust complaint.

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21 Maureen K. Ohlhausen, *Antitrust over Net Neutrality: Why We Should Take Competition in Broadband Seriously*, 15 COLO. TECH. L.J. 119, 136 (2017).

22 *Id.* at 119.

23 *Id.* at 139–40.

24 *Id.* at 140.

25 *Id.* at 142.

26 *Id.*

Ohlhausen argues generically that Section 1 of the Sherman Act "has sufficient teeth to capture vertical restraints that harm competition when entered into by parties that enjoy market power,"[27] and that Section 2 would apply "if an edge provider is dominant."[28] In both examples, she relies on the assumption that the preferred content provider (our telemedicine firm) has market power in some relevant content market. But what if it does not? What if the ISP partners with an upstart content provider (which clearly lacks market power)? That Comcast makes one firm its preferred vendor of telemedicine does not prevent an in-region ISP rival, such as AT&T or Verizon, from doing the same (or from offering paid priority to all telemedicine comers), thereby disciplining any exercise of upstream market power. Proponents of an antitrust approach fail to cite any applicable antitrust cases that would provide a roadmap for complaining edge providers.

Joshua Wright argues that vertical arrangements that harm *consumers* via price, output, innovation, or quality effects are cognizable with antitrust and consumer protection law.[29] As explained above, it is not clear whether, absent short-run price and output effects, a private litigant could demonstrate harm to consumers flowing from a paid-priority arrangement via a loss in innovation. To be fair, Wright and Ohlhausen take the view that antitrust is superior to net neutrality as defined by the FCC in its 2015 Open Internet Order, not that antitrust is superior to every other conceivable regime (including the regime proposed below).

Like net neutrality, violations of search neutrality might also go undetected by the antitrust laws.

Like Ohlhausen, Wright does not offer any cases that would provide guidance on how a similarly situated telemedicine provider should structure a complaint under the antitrust laws, or the likelihood of success. And while he embraces the traditional error-cost framework, Wright skips over the issue of whether the cost of enforcement under antitrust is so high as to render this remedy ineffective to cure any loss in innovation—the mechanics of modern antitrust litigation are exceedingly costly and time-consuming. In a related paper, Thomas Hazlett and Joshua Wright explain the conditions under which vertical arrangements between an ISP and an edge provider would be deemed vertical foreclosure under antitrust law.[30] Under the hypothetical of mild preferencing considered here, however, rival edge providers are not foreclosed from accessing the ISP's customers.

Another Gap in Antitrust: Search Neutrality

Like net neutrality, violations of search neutrality might also go undetected by the antitrust laws. Suppose a search engine vertically integrates into content, such as local search, and affords its affiliated properties mild preference in its search algorithm. In particular, the search engine's affiliated sites appear higher in the search rankings. And in many instances, there is real exclusion of rivals from prominent placement, in the sense that users are not willing to look to lower-ranked search results. Because the offer of preference is, by assumption, not extended to independent content providers, the arrangement is discriminatory, plain and simple. But does it amount to an antitrust offense?

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[27] *Id.* at 141.

[28] *Id.*

[29] Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Net Neutrality Meets Regulatory Economics 101, Remarks at The Federalist Society Media and Telecommunications Practice Group Event: The Future of Media—Is Government Regulation in Today's Media Landscape "Over-The-Top"? (Feb. 25, 2015), https://www.ftc.gov/system/files/documents/public_statements/626591/150225wrightfedsoc.pdf.

[30] Thomas Hazlett & Joshua Wright, *The Effect of Regulation on Broadband Markets: Evaluating the Empirical Evidence in the FCC's 2015 'Open Internet' Order*, 50 Rev. Indus. Org. 487 (2017).

Michael Luca et al. showed that Google deviates from its organic search results to favor its own local properties in a single search query (for cafés in Louisville, Kentucky).[31] Luca et al. find that when Google reverted back to its organic search results, which elevated the rankings of competing independent properties, users were 40 percent more likely to engage with the search results, as measured by click activity. To the extent that fewer clicks (engagements) mean fewer matches between buyers and sellers on the Internet (and fewer consummated transactions), Google's favoritism of its own local properties could reduce output. It also implies a profit sacrifice for its general search division, which presumably is made up for by a gain to its vertical (local search). And conduct by a firm with market power that restricts output (or leads to higher prices) without any efficiency justification is generally condemned by antitrust. Finally, degrading one's own product can be considered the equivalent of a short-term profit sacrifice, which could trigger liability under the DRTD framework outlined above.[32]

[I]f antitrust is the wrong fit for innovation-based cases, what is the right way to deal with net neutrality?

This hypothetical gets closer to the fact pattern in *Otter Tail*, given Google's vertical integration into a complementary service. Despite this similarity, however, a disadvantaged rival in the search vertical would be hard-pressed to prevail in antitrust court for other reasons. To begin, the Federal Trade Commission has concluded that, under a particular fact pattern, adding a box for vertical content was a product improvement, even if it excluded rivals.[33] Moreover, any proof of output effects or profit sacrifice would turn on Google's historical search records, which could prove complex in terms of constructing a but-for world—that is, how many clicks from search results would have been performed had Google not altered its search algorithms.

An *Ex Post* Alternative to Antitrust: A New Tribunal

So, if antitrust is the wrong fit for innovation-based cases, what is the right way to deal with net neutrality? Before providing my answer, a brief review of the regulatory options is in order. At the highest level, the regulator must choose between *ex ante* prohibitions (analogous to a per se rule in antitrust) and *ex post* rules (analogous to a rule of reason in antitrust). The FCC's 2015 Open Internet Order imposed a per se ban on paid-priority arrangements, yet subjected zero-rating deals to case-by-case review, despite their similarities in economic terms.[34] (Although the preference is exchanged for payment in both instances, the economic impact of faster transmission and free transmission is arguably different.) Although *ex ante* rules function as a sharper Damoclean sword, as with any blanket ban involving vertical restraints there is a risk that nondiscriminatory, procompetitive arrangements would be banned as well. When conduct can be motivated for both procompetitive and anticompetitive reasons, economists (and antitrust law) tend to favor ex post rules so as to avoid those types of error costs.

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31 Michael Luca et al., *Does Google Content Degrade Google Search? Experimental Evidence* (Harvard Business School Working Paper 16-035, 2016). A similar theory has been advanced by the European Union, which accuses Google of diverting traffic from competitive rivals to favor its own comparison-shopping site. *See, e.g.*, Mark Scott, *Google Fined Record $2.7 Billion in E.U. Antitrust Ruling*, N.Y. Times, June 27, 2017, https://www.nytimes.com/2017/06/27/technology/eu-google-fine.html.

32 For a critical review of Luca et al.'s methodology, as well as an argument for why there is no legal basis for imposing upon Google a duty to deal with a competitor like Yelp, see Geoffrey Manne, Ben Sperry & Kristian Stout, *A Critical Assessment of the Latest Charge of Google's Anticompetitive Bias from Yelp and Tim Wu* (ICLE Antitrust & Consumer Protection Research Program White Paper 2016-3).

33 To be fair, the FTC staff reportedly recommended the Commission bring a case against Google, which suggests a search-neutrality case was conceivable, though the staff may have grounded their case in the less traditional Section 5 of the FTC Act. And the European competition authorities perceive Google's discrimination as cognizable under European competition law.

34 FCC 2010 Open Internet Order, *supra* note 2.

Along the *ex post* branch of the decision tree, there are two choices: (1) any preferential arrangement between an ISP and edge provider involving a payment presumptively *violates* a nondiscrimination principle, as adopted in the FCC's 2010 Open Internet Order; or (2) any preferential arrangement between an ISP and edge provider involving a payment presumptively *does not violate* a nondiscrimination principle, as contemplated in the FCC's May 2014 Notice of Proposed Rulemaking.[35] Under the first choice, the burden of proof to reverse the presumption is placed on the parties to the paid priority arrangement; under the second choice, the burden of proof to reverse the presumption is placed on the disadvantaged edge provider. It bears noting that the D.C. Circuit in *Verizon v. FCC*[36] ruled that option (1) was tantamount to common carrier regulation, and thus could not be based in the Commission's authority under Section 706 of the Telecommunications Act. And the court hinted that option (2) was feasible.

This is not the first time that Congress confronted the problem of discrimination by a dominant platform provider and the limits of antitrust. By the early 1990s, as noted by Tasneem Chipty,[37] cable operators had vertically integrated into programming and demonstrated a willingness to favor their own content over competitive programming rivals. For example, in the early 1990s, Comcast and TCI were less likely to carry Home Shopping Network compared to their affiliated (and similarly situated) QVC. Chipty also finds that the cable operators' favoritism is efficient in the sense that price-product mix for integrated offerings were superior, which suggests that the motivation for the program-carriage rules may have been outside the scope of traditional economic concerns such as efficiencies.

Rather than ban vertical integration by cable operators into programming, Congress permitted it. But as a compromise, Congress empowered the FCC to police certain kinds of discriminatory conduct that harmed independent programmers, presumably by discouraging innovation by independent voices or reducing program diversity. These protections were codified in Section 616 of the Cable Act in 1992. Importantly, Congress recognized that antitrust was too unwieldy an instrument and established an evidentiary burden (harm to the independent programmer) that was less than the burden in antitrust (harm to competition). In particular, the complaining cable network bears the burden of overturning the presumption that any differential treatment was nondiscriminatory by showing (1) it was similarly situated to the affiliated network, (2) it was afforded inferior treatment relative to the affiliated network for reasons relating to affiliation, and (3) it was unreasonably restrained or impaired in its ability to compete due to the disparate treatment. In *Comcast Cable Communications v. FCC*, the D.C. Circuit elucidated what kind of evidence would be needed to show affiliation-based discrimination—for example, that the cable operator sacrificed its downstream profits to benefit its affiliated cable network.[38]

By adding these nondiscrimination protections, Congress meant to fill a gap in antitrust protection. At the time the Cable Act was amended, the largest cable operator in the country, TCI, served fewer than 20 percent of national cable subscribers; an antitrust complaint by a national

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35 Fed. Comm'ns Comm'n, Protecting and Promoting the Open Internet, GN Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (2014).

36 Verizon Commc'ns Inc. v. FCC, 740 F.3d 623, 655–58 (D.C. Cir. 2014) (vacating the Commission's rule prohibiting "unreasonable discrimination" by fixed broadband providers on the theory that it "so limited broadband providers' control over edge providers' transmissions that [it] constitute[d] common carriage *per se*.").

37 Tasneem Chipty, *Vertical Integration, Market Foreclosure, and Consumer Welfare in the Cable Television Industry*, 91 Am. Econ. Rev. 428 (2001).

38 Comcast Cable Commc'ns v. FCC (*Tennis I*), 717 F.3d 982 (D.C. Cir. 2013).

cable network against TCI was sure to fail the market-power requirement. (And in some circuits, the "foreclosure share" flowing from the exclusionary conduct in an antitrust case must have exceeded 40 percent to establish a violation under Section 1 of the Sherman Act.[39]) In the alternative, Congress sought to elevate non-economic concerns in regulated industries without reverting to a world where antitrust can have non-welfare-based goals.

In the past decade, several complaints have been brought against vertically integrated cable operators pursuant to Section 616. Some of the notable cases include *NFL Network v. Comcast*,[40] *MASN v. Comcast*,[41] *Tennis Channel v. Comcast*,[42] and *GSN v. Cablevision*.[43] In each case, the FCC's Administrative Law Judge (ALJ) held an evidentiary hearing, and for the *NFL Network* and *MASN* cases, the complainant achieved a modicum of relief in the form of broader carriage than what was originally offered. The Tennis Channel prevailed before the ALJ and the FCC, but because the D.C. Circuit overturned those findings, the Tennis Channel never achieved relief. GSN prevailed before the ALJ, but the decision was overturned by a 2–1 vote at the FCC along party lines.[44]

The case-by-case regime contemplated here is significantly different from that conceived in the FCC's 2015 Open Internet Order to assess zero-rating plans.

While this case-by-case procedure is by no means perfect, it does provide a template for how disputes between competing factions of the Internet ecosystem can be adjudicated. Plaintiffs in program-carriage complaints have secured favorable decisions before the ALJ, but often have not achieved injunctive relief from the discrimination while the cases were appealed to the FCC and, in the case of the Tennis Channel, appealed once again to the D.C. Circuit. One notable exception is the NFL Network, which secured a settlement (placing NFL Network on the same tier as Comcast's sports network) before the ALJ reached his decision. The tweaks to this template are offered below.

The case-by-case regime contemplated here is significantly different from that conceived in the FCC's 2015 Open Internet Order to assess zero-rating plans. There, the Chairman's office undertook the investigation of whether an ISP's zero-rating plan violated a newly adopted (and nebulous) standard called the "Internet conduct" standard. Under a complaint-driven process, by contrast, there is less chance for under-enforcement of discriminatory conduct under a Republican-led FCC or for over-enforcement under a Democrat-led FCC. Investigations would be triggered by complainants as opposed to FCC officials, and complaints would be just as likely to be filed under Republican control as under Democrat control.[45] An ALJ is also preferable to adjudicate formal complaints to the FCC: by using a neutral factfinder to adjudicate the disputes, politics would be largely removed from the process.[46] It bears noting that, before his term expired,

[39] *See, e.g.*, ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 277 (3d Cir. 2012).

[40] Memorandum Opinion and Order, NFL Enterprises LLC v. Comcast Cable Communications LLC, FCC MB Dkt. No. 08-214 (Dec. 31, 2008).

[41] Order, TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network v. Comcast Corp., FCC File No. CSR-8001-P (Aug. 19, 2008).

[42] Initial Decision of Chief Administrative Law Judge, Tennis Channel, Inc., Complainant v. Comcast Cable Commc'ns, L.L.C., FCC-11D-01A1 (Dec. 20, 2011).

[43] Initial Decision of Chief Administrative Law Judge, Game Show Network, LLC, Complainant v. Cablevision Sys. Corp., FCC-16D-1A1 (Nov. 23, 2016).

[44] The author testified as the plaintiff's economic expert in each of these matters.

[45] If the complaints are ultimately subject to FCC review, however, and if one political party is seen as more or less amenable to the complaint, then that would have an effect on the decision to file. This is yet another reason to insulate the arbitrator from political forces.

[46] To be fair, the Commissioners could inject politics via the appointment of the ALJ, but this could be addressed in many ways, including the requirement of a unanimous vote for the ALJ among the Commissioners.

Chairman Wheeler (a Democrat) hinted that AT&T's and Verizon's zero-rating plans were in violation of the Internet conduct standard[47]; Chairman Pai (a Republican) ended the investigation.

It is not clear whether the FCC has the authority to establish this tribunal under Section 706, or even if it does, whether there is a sufficient appetite among the Republican-led Commissioners to extend Section 706 authority this way. Congress likely would have to pass legislation to empower the FCC to create the new tribunal, perhaps coupled with a clear statement that Section 706 is not an independent grant of authority and that ISPs are not subject to Title II (common-carrier regulation). While Congress could empower any agency to police the Internet for discrimination, the FCC is a natural forum given the agency's experience in adjudicating program carriage complaints against vertically integrated cable operators. Alternatively, the tribunal could operate outside of a federal agency, along the lines of Article I courts, in which case the findings would not be subject to review by political appointees.

A major drawback for *ex post* enforcement is timeliness and enforcement costs. To expedite this process, the new forum could require that, during the appeals process, the disparate treatment ends (via injunctive relief) upon a finding of discrimination by the ALJ. Alternatively, the decision by the ALJ could be binding, as is done in certain merger orders.[48] Because ISPs are more likely to have greater litigation resources than websites, with the exception of such behemoths as Google, Netflix, and Facebook, this limitation on appeals would benefit edge providers more than ISPs. Binding arbitration would limit the duration of case-by-case adjudication to months instead of years. Another benefit of limiting appeals is that it would eliminate the FCC commissioners (and any whiff of politicization) from the adjudication process.

A burden-shifting approach could be used to reduce the initial litigation expense of complaining edge providers. The evidentiary criteria used in program-carriage complaints described above could be imported into the new tribunal. (By conflating antitrust standards with nondiscrimination standards, the profit-sacrifice criterion was ill-conceived, and in any event, cannot be applied in instances where there was no change in the treatment of the independent edge provider.) These requirements would serve as a proxy or surrogate test for proving harm to innovation, much like the avoided-litigation test from *Actavis*[49] serves as a surrogate for proving harm to consumers in reverse-payment cases.[50] If the plaintiff makes a prima facie case of discrimination, the burden shifts to the defendant to prove an efficiency rationale; if defendants offers a credible rationale, the burden shifts back to the plaintiff to show a net harm. Special rules could be made for complaints brought by startups, in recognition of their financial burdens.

Finally, there is no reason to limit the forum for discrimination complaints against ISPs. This new tribunal could resolve claims that an ISP gave preferable terms of a paid-prioritization arrangement to an affiliated content provider as readily as it could resolve claims that a search provider gave preferable ranking to an affiliated web property. Extending the forum this way, however, raises issues of whether the FCC is the proper venue in which to house the new tribunal, as the FCC has never regulated those firms. An expanded tribunal could be housed at the FTC, or it could exist apart from any agency.

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[47] Letter from Tom Wheeler, FCC Chairman, to Senator Edward Markey (Jan. 11, 2017), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0111/DOC-342982A1.pdf.

[48] Whether such relief would be in violation of the Administrative Procedure Act is beyond the scope of this essay.

[49] FTC v. Actavis, 133 S. Ct. 2223, 2237 (2013).

[50] *See, e.g.*, Kevin Caves & Hal Singer, *On the Utility of Surrogates for Rule of Reason Cases*, CPI ANTITRUST CHRON. (May 2015).

Conclusion

In April 2017, the FCC issued a notice of proposed rulemaking (NPRM), in which it sought guidance in dealing with the thornier issues raised in the net neutrality debate.[51] In paragraph 75, the NPRM seeks comment on whether, when dealing with zero-rating offers, the Commission should "consider another general rule and framework, such as Commission adjudication of [sic] discrimination complaints." In paragraph 78, the NPRM notes that "[w]ith the existence of antitrust regulations aimed at curbing various forms of anticompetitive conduct, such as collusion and vertical restraints under certain circumstances, we seek comment on whether these [net neutrality] rules are unnecessary in light of these other regulatory regimes."

For the foregoing reasons, antitrust is not the appropriate venue to adjudicate discrimination complaints on the Internet when the key issue is an innovation loss. A new tribunal is needed, even "in light of these other regulatory regimes." And it can be patterned on an existing forum used by the FCC to adjudicate discrimination complaints under very similar fact patterns involving largely the same defendants. ●

[51] Fed. Commc'ns Comm'n, Restoring Internet Freedom, Notice of Proposed Rulemaking, WC Docket No. 17-108 (Apr. 27, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-344614A1.pdf.